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## THE DEFENSE OF ENTRAPMENT IN CALIFORNIA

Entrapment has been defined as "the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer."<sup>1</sup> The word "officer" in this definition includes police officers, law enforcement agents, and private citizens working with the police as informers.<sup>2</sup> Entrapment is an affirmative or positive defense to a criminal charge.<sup>3</sup> The essential elements of the defense are a lack of criminal intent on the part of the accused prior to his contact with the police officer or informer,<sup>4</sup> and persuasion, inducement, or allurement on the part of the officer<sup>5</sup> resulting in a criminal act which otherwise would not have been committed.<sup>6</sup>

There are two general situations in which those accused of a crime have successfully asserted the defense of entrapment. In one type of situation proof of entrapping methods has negated an essential element of the crime. An example of this situation is where, in a prosecution for violation of a theft statute, the evidence shows that the owner of the property actively participated in delivering it to the defendant and therefore is found to have consented to the property being taken.<sup>7</sup> Since lack of consent on the part of the property owner is an essential element of this type of crime,<sup>8</sup> entrapment is successful as a defense because the prosecutor fails to sustain his burden of proving the defendant guilty of the crime.<sup>9</sup> In the second type of situation the defense of entrapment is asserted when the defendant has been induced to commit the crime by

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<sup>1</sup> *Sorrells v. United States*, 287 U.S. 435, 454 (1932); *People v. Lindsey*, 91 Cal. App. 2d 914, 916, 205 P.2d 1114, 1115 (1949).

<sup>2</sup> *See, e.g., People v. Perez*, 62 Cal. 2d 769, 775, 401 P.2d 934, 937 (1965). An informer must have entered into the cooperative plan with the police, thus in a sense becoming an agent for them, prior to his alleged entrapment of the defendant. *See Note, Entrapment*, 73 HARV. L. REV. 1333, 1340-41 (1960). *But see In re Moore*, 70 Cal. App. 483, 488, 233 P. 805, 807 (1924) (dictum), where entrapment was considered an issue although the alleged entrappers were "investigators" for the Anti-Saloon League who had no previous arrangement with the police.

<sup>3</sup> *E.g., People v. Adams*, 213 Cal. App. 2d 537, 540, 29 Cal. Rptr. 57, 59 (1963) (affirmative); *People v. D'Agostino*, 190 Cal. App. 2d 447, 461, 11 Cal. Rptr. 847, 856 (1961) (positive).

<sup>4</sup> *See, e.g., People v. Rivers*, 188 Cal. App. 2d 189, 192, 10 Cal. Rptr. 309, 311-12 (1961); *People v. Groszofsky*, 73 Cal. App. 2d 15, 18, 165 P.2d 757, 759 (1946).

<sup>5</sup> *See, e.g., People v. Lagomarsino*, 97 Cal. App. 2d 92, 96, 217 P.2d 124, 127 (1950), *quoting People v. Lindsey*, 91 Cal. App. 2d 914, 917, 205 P.2d 1114, 1115 (1949).

<sup>6</sup> *E.g., People v. Evans*, 134 Cal. App. 2d 733, 736, 286 P.2d 368, 369 (1955).

<sup>7</sup> *E.g., People v. Werner*, 16 Cal. 2d 216, 224, 105 P.2d 927, 932 (1940).

<sup>8</sup> *People v. Cannon*, 77 Cal. App. 2d 678, 692, 176 P.2d 409, 417 (1947).

<sup>9</sup> CAL. PEN. CODE § 1096 requires that the prosecutor prove the defendant in a criminal action guilty beyond a reasonable doubt, or the defendant is entitled to an acquittal.

an undercover police officer or an informer working in cooperation with the police, but none of the essential elements of the crime is negated. It is this type of entrapment that is the concern of this comment.

A good example of the second type of situation is found in *Sherman v. United States*.<sup>10</sup> In that case a government informer met the defendant at a doctor's office where both men were being treated for narcotics addiction. After cultivating the defendant's friendship during subsequent meetings at the doctor's office, the informer told the defendant that he was failing to respond to treatment and asked the defendant if he knew a good source where he could obtain narcotics for the informer's own use. Following the defendant's refusal to help, the informer repeatedly made similar requests, coupled with appeals to sympathy and friendship, until the defendant finally acquiesced. The defendant thereafter made a number of small purchases from which he sold half to the informer, each sale being observed by informed agents of the Bureau of Narcotics. The United States Supreme Court held that the evidence showed entrapment had taken place as a matter of law.<sup>11</sup>

In California, as in most other jurisdictions, entrapment is not a statutory defense. It has been created and developed solely by the courts. It is the purpose of this comment to define and analyze the doctrine of entrapment as it has developed in California; to point out some of the apparent confusion in regard to the legal basis of the defense and the rules which should logically follow from this basis; and to suggest changes in the doctrine which would help alleviate the confusion.

For two reasons emphasis will be placed upon the use of the defense of entrapment in narcotics cases. First, the peculiar nature of narcotics offenses<sup>12</sup> and the problems they present to effective law enforcement necessarily lead to the use of trapping methods by police. Violations of narcotics laws are of a secret and consensual nature,<sup>13</sup> and detection is nearly impossible without some form of police participation and inducement. Second, section 11106 of the California Health and Safety Code provides for state reimbursement of sums expended by officers of the Division of Narcotic Enforcement in purchasing drugs for evidence and in the employment of "operators" to obtain evidence. Both the nature of narcotics offenses and section 11106 of the Code undoubtedly contribute to the fact that the defense of entrapment is asserted more frequently in narcotics cases than in any other type of criminal case.<sup>14</sup>

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<sup>10</sup> 356 U.S. 369 (1958).

<sup>11</sup> *Id.* at 373.

<sup>12</sup> For the California narcotics offenses see CAL. HEALTH & SAFETY CODE §§ 11500-57.

<sup>13</sup> See generally Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1113 (1951); 8 U.C.L.A.L. REV. 463, 465 (1961).

<sup>14</sup> A survey conducted by the authors of this comment reveals that 18 cases involving a claim of entrapment were appealed in California during the years 1965-1966. The criminal charge in 14 of these 18 cases involved violations of narcotics statutes.

## Legal Justification for the Doctrine

Entrapment did not exist as a defense at common law, and the American courts only began to develop the doctrine in the late 19th century.<sup>15</sup> No California case has been found before the 20th century where entrapment was discussed other than cases where the defense negated an essential element of the crime.<sup>16</sup> In cases prior to the 20th century, however, defendants attempted to make use of police participation in the crime to secure acquittal in another way. When the only evidence produced against the defendant was the testimony of the participating officer or informer, the claim was asserted that the officer's participation made him an accomplice and, therefore, a conviction based solely on his uncorroborated testimony would violate the California rule requiring corroboration of accomplice testimony.<sup>17</sup> As a result, California courts adopted the "feigned accomplice" rule, which provided that the testimony of one who feigned cooperation with a person in his criminal design in order to secure evidence did not require corroboration.<sup>18</sup>

In 1905 a California appellate court indicated that there was a "rule against encouraging crime, merely to procure its commission, to the end that those willing to become offenders may be punished."<sup>19</sup> This statement was apparently a recognition of the entrapment doctrine which was developing in the courts of other jurisdictions.<sup>20</sup> In the 1915 case of *Woo Wai v. United States*<sup>21</sup> entrapment became a part of the federal law when the Ninth Circuit Court reversed a conviction on the ground that persuasion or allurement into the commission of crime by government officers was a valid defense to a criminal charge.<sup>22</sup> This influential case probably resulted in a greater recognition of the defense by the California courts and in an effort to define it in a more detailed manner.<sup>23</sup>

<sup>15</sup> See Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. PA. L. REV. 245, 245-46 (1942).

<sup>16</sup> An example of a California case where entrapment was treated as negating an essential element of a crime is *People v. Collins*, 53 Cal. 185 (1878).

<sup>17</sup> See, e.g., *People v. Farrell*, 30 Cal. 316, 317 (1866). CAL. PEN. CODE § 1111 sets out the rule requiring that accomplice testimony be corroborated.

<sup>18</sup> E.g., *People v. Farrell*, 30 Cal. 316, 317 (1866).

<sup>19</sup> *People v. Bunkers*, 2 Cal. App. 197, 209, 84 P. 364, 370 (1905) (dictum).

<sup>20</sup> See, e.g., *United States v. Whittier*, 28 F. Cas. 591 (No. 16,688) (C.C.E.D. Mo. 1878) (dictum); *Ford v. City of Denver*, 10 Colo. App. 500, 51 P. 1015 (1898).

<sup>21</sup> 223 F. 412 (9th Cir. 1915).

<sup>22</sup> *Id.* at 415.

<sup>23</sup> There appears to have been at least one other influencing factor causing increased recognition of the defense of entrapment by California courts. In 1918 the legal encyclopedia *Corpus Juris* listed entrapment as a defense to a criminal charge and traced its development in the American courts to that time. C.J. *Criminal Law* § 57 (1918). The very next year a California appellate court, while discussing the doctrine, gave particular emphasis to what had been said in *Corpus Juris*. *People v. Macy*, 43 Cal. App. 479, 482, 184 P. 1008, 1009-10 (1919). Also, it is possible that the passage of the National Prohibition Act (Act of Oct. 28, 1919), ch. 85, 41 Stat. 305, and the Wright Act, Cal. Stats. 1921, ch. 80, at 79, its California equivalent, violations of which involved the same secret and consensual acts as narcotic offenses, increased the number of cases involving police solicitation of crime and resulting claims

Following the lead of *Woo Wai*, a California appellate court in 1918 concluded that to convict a person who had no intent to commit the crime prior to his contact with a police officer or informer, and who had been inveigled into its commission by such a person, would be "repugnant to any just conception of good morals and violative of sound public policy."<sup>24</sup> But the court, and other California courts which repeated the reasoning,<sup>25</sup> failed to be more specific and explain the legal justification for this public policy. The question of legal justification was not dealt with in California until after the federal courts had faced the problem in 1932 in *Sorrells v. United States*.<sup>26</sup>

In *Sorrells* a divided Supreme Court espoused conflicting views on the legal justification for the defense of entrapment. The majority of the Court justified the defense on the theory that the acts of a person who had been entrapped did not fall within the purview of the statute under which he was being prosecuted, "because it cannot be supposed that Congress intended that the letter of its enactment should be used to support such a gross perversion of its purpose."<sup>27</sup> In other words, according to the Court, when entrapment is proven the defendant is acquitted because the law was not intended to apply to him; that is, he has not committed a crime.

A minority of the justices concurred in the decision but did not agree with the rationale of the majority. In the view of the minority, it was "unwarranted" to say that a crime had not been committed solely because the police had inveigled the accused into its commission.<sup>28</sup> Entrapment, according to the minority, was not a defense for the accused at all. It "attributes no merit to a guilty defendant,"<sup>29</sup> who, by "his act, coupled with his intent to do the act, brings him within the definition of the law; he has no rights or equities by reason of his entrapment."<sup>30</sup> Instead, in the minority view entrapment was a defense for the courts to apply in order to prevent the government from using methods of law enforcement which amounted to a "prostitution of the criminal law,"<sup>31</sup> and to prevent the courts from being made an "instrument of wrong."<sup>32</sup> The legal justification for the defense was that it was necessary in order for the courts to protect the "purity of government"<sup>33</sup> as well as the courts' own purity, a duty which was within their exclusive province.<sup>34</sup> Under the minority theory the defendant, though guilty

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of entrapment. See *Sorrells v. United States*, 287 U.S. 435, 453 (1932) (concurring opinion); cf. *In re Moore*, 70 Cal. App. 483, 484, 233 P. 805 (1924); *People v. Tomasovich*, 56 Cal. App. 520, 523, 206 P. 119, 120 (1922).

<sup>24</sup> *People v. Barkdoll*, 36 Cal. App. 25, 28, 171 P. 440, 441 (1918) (dictum).

<sup>25</sup> E.g., *People v. Norcross*, 71 Cal. App. 2, 8, 234 P. 438, 440-41 (1925); *In re Moore*, 70 Cal. App. 483, 487-88, 233 P. 805, 806-07 (1924).

<sup>26</sup> 287 U.S. 435 (1932).

<sup>27</sup> *Id.* at 452.

<sup>28</sup> *Id.* at 456.

<sup>29</sup> *Id.* at 455.

<sup>30</sup> *Id.* at 456.

<sup>31</sup> *Id.* at 457.

<sup>32</sup> *Id.* at 456.

<sup>33</sup> *Id.* at 455.

<sup>34</sup> *Id.* at 457.

as charged, would be acquitted for the purpose of maintaining proper standards of conduct in government and the courts.

In the 1954 case of *People v. Jackson*,<sup>35</sup> the California Supreme Court for the first time reached a conclusion on the question of the legal justification for the defense of entrapment. The conclusion was similar to that of the majority in *Sorrells*. In essence, a defendant who had been entrapped was acquitted because under the circumstances he had not committed a crime. The court explained that

[u]nder the doctrine of entrapment, the overt acts essential to the commission of the offense are assumed to have been committed by the defendant. But the criminal intent, as here also essential to the completion of the crime, is not assumed to have been established. It is assumed to be lacking . . . .<sup>36</sup>

The reasoning of the *Jackson* court resembled the theory that entrapment is a successful defense if it negates an essential element of the crime.<sup>37</sup> While differing in form from the theory of the majority in *Sorrells*, it reached the same result—a defendant who had been entrapped had committed no crime.<sup>38</sup>

In 1958 the United States Supreme Court again dealt with the legal justification for the doctrine of entrapment,<sup>39</sup> and the Court split along the same lines as in *Sorrells*. The majority refused to re-examine the theory espoused by the majority in *Sorrells*,<sup>40</sup> while the minority asserted that the justification for the defense was that it deterred "impermissible police conduct."<sup>41</sup> The power to establish a policy for regulating police conduct, the minority explained, was based on the recognized jurisdiction of the courts to formulate and apply proper standards for enforcement of the federal criminal law in the federal courts, so long as Congress had not specifically legislated to that end.<sup>42</sup>

With this renewed conflict of views among the United States Supreme Court Justices in the background, the issue again came before the California Supreme Court in the 1959 case of *People v. Benford*.<sup>43</sup> This time the court discarded its stand in *Jackson*,<sup>44</sup> and adopted the reasoning of the concurring justices in *Sorrells* and *Sherman*. The court maintained that the only justification for the defense is "out of regard for its [the court's] own dignity, and in the exercise of its power and the performance of its duty to formulate and apply proper standards for judicial enforcement of the criminal law . . . ."<sup>45</sup> The defense affords no merit to the guilty defendant

<sup>35</sup> 42 Cal. 2d 540, 268 P.2d 6 (1954).

<sup>36</sup> *Id.* at 547, 268 P.2d at 11 (dictum).

<sup>37</sup> See text accompanying notes 6-9 *supra*.

<sup>38</sup> The theory that a person who had been entrapped had committed no crime had been recognized as the California law prior to *Jackson*. In 1946 the editors of CALJIC had included it in the recommended jury instructions on the defense of entrapment. CALJIC Instruction No. 851 (1946).

<sup>39</sup> *Sherman v. United States*, 356 U.S. 369 (1958).

<sup>40</sup> *Id.* at 378-79 (concurring opinion).

<sup>41</sup> *Id.* at 385 (concurring opinion).

<sup>42</sup> *Id.* at 380-81.

<sup>43</sup> 53 Cal. 2d 1, 345 P.2d 928 (1959).

<sup>44</sup> *People v. Jackson*, 42 Cal. 2d 540, 268 P.2d 6 (1954).

<sup>45</sup> *People v. Benford*, 53 Cal. 2d 1, 9, 345 P.2d 928, 933 (1959).

who is "just as guilty where his seducer is a police officer as he would be if he were persuaded by a hardened criminal accomplice."<sup>46</sup> Thus in *Benford* the court established that the legal justification for the defense of entrapment in California is that it provides the courts with a means of carrying out their duty of setting proper standards of law enforcement. It has nothing to do with the innocence of the defendant, who is no less culpable because of his entrapment. This view has been followed in subsequent California cases.<sup>47</sup>

### Evaluation of the Legal Justification

There are a number of arguments which may be used to point out the weaknesses of the "police conduct" theory of entrapment formulated by the concurring justices in *Sorrells* and *Sherman* and adopted by California in *Benford*. First, it has been suggested that the reasoning of the theory is circular, and ultimately must be reduced to a conclusion that the defendant's guilt is diminished.<sup>48</sup> It is difficult to dispute the soundness of this suggestion. The supporters of the "police conduct" theory reason that the court must turn its back against the prosecution of a person who has been entrapped because public policy requires that they discourage "impermissible police conduct."<sup>49</sup> But why is the police conduct impermissible?

Before an answer to this question is proposed, it should be noted that the courts which use the "police conduct" theory have acknowledged that police "may lawfully descend to the depths of deceit and trickery"<sup>50</sup> in order to apprehend those engaged in the commission of crime.<sup>51</sup> These courts distinguish between "the trap for the unwary innocent and the trap for the unwary criminal"<sup>52</sup> because only the former is held to be entrapment.<sup>53</sup> The latter is a permissible method of law enforcement.<sup>54</sup> Such statements make it clear that the supporters of the "police conduct" theory do not believe that the conduct is impermissible merely because it is fraudulent, deceitful, and amounts to a trap. Hence, the impermissibility of the police conduct does not lie in the nature of the methods employed,<sup>55</sup> but in the *type of person* apprehended by the use of the

<sup>46</sup> *Id.* at 9, 345 P.2d at 934.

<sup>47</sup> See, e.g., *People v. Valverde*, 246 Cal. App. 2d 318, 322-24, 54 Cal. Rptr. 528, 531-32 (1966); *People v. Chavez*, 184 Cal. App. 2d 741, 744, 7 Cal. Rptr. 729, 731 (1960). But see *People v. Monteverde*, 236 Cal. App. 2d 630, 639, 46 Cal. Rptr. 206, 213 (1965), quoting from *People v. Jackson*, 42 Cal. 2d 540, 547, 268 P.2d 6, 13 (1954).

<sup>48</sup> Note, *Entrapment*, 73 HARV. L. REV. 1333 (1960).

<sup>49</sup> *Sherman v. United States*, 356 U.S. 369, 385 (1958) (concurring opinion).

<sup>50</sup> *People v. Ollado*, 246 Cal. App. 2d 608, 615, 55 Cal. Rptr. 122, 126 (1966).

<sup>51</sup> See, e.g., *Sorrells v. United States*, 287 U.S. 435, 453-54 (1932) (concurring opinion).

<sup>52</sup> *People v. Benford*, 53 Cal. 2d 1, 10-11, 345 P.2d 928, 934 (1959), quoting from *Sherman v. United States*, 356 U.S. 369, 372 (1958); *People v. D'Agostino*, 190 Cal. App. 2d 447, 462, 11 Cal. Rptr. 847, 856 (1961).

<sup>53</sup> *Id.*

<sup>54</sup> See text accompanying note 50 *supra*.

<sup>55</sup> "The law does not concern itself with the morality or ethics of such

methods. The answer, according to the apparent logic of the theory itself, is that the police conduct is impermissible only because it leads to the arrest and conviction of persons who are not sufficiently blameworthy to merit punishment.<sup>56</sup>

In spite of the position of the "police conduct" theory that the defense of entrapment does not relieve the defendant's guilt, it is interesting that California courts after *Benford* seem to recognize the defense when they feel that the defendant is not sufficiently culpable to merit punishment. Illustrative of this point are *People v. Goree*<sup>57</sup> and *People v. Ollado*.<sup>58</sup> Both cases involved charges of selling or furnishing a narcotic.<sup>59</sup> No greater amount of police persuasion appears to have taken place in one case than in the other.<sup>60</sup> Yet in *Goree* the appellate court found that the evidence was such that a jury could reasonably conclude that while the defendant was a "user," he was not a "pusher," and his furnishing marijuana to the officer was an isolated act not intended or designed by him until

trickery. Upon the contrary, it encourages and deems to be admirable the use by law enforcement agencies of methods in the apprehension of offenders which in the minds of all just men are considered dishonorable and abhorrent." Whitlow v. Board of Medical Examiners, 248 A.C.A. 595, 608, 56 Cal. Rptr. 525, 534 (1967).

<sup>56</sup> At present there is little authority for the proposition that police methods which induce crime are impermissible because they violate the defendant's constitutional rights. Only one federal court has stated that a conviction procured by entrapment violates the defendant's rights to due process of law. *Banks v. United States*, 249 F.2d 672, 674 (9th Cir. 1957) (dictum). No California court has so stated. For a discussion of this point, see Comment, *The Entrapment Doctrine in the Federal Courts, and Some State Court Comparisons*, 49 J. CRIM. L.C. & P.S. 447, 449 (1959).

<sup>57</sup> 240 Cal. App. 2d 304, 49 Cal. Rptr. 392 (1966).

<sup>58</sup> 246 Cal. App. 2d 608, 55 Cal. Rptr. 122 (1966).

<sup>59</sup> *Id.* at 609-10, 55 Cal. Rptr. at 122-23; *People v. Goree*, 240 Cal. App. 2d 304, 305-06, 49 Cal. Rptr. 392 (1966).

<sup>60</sup> The evidence discussed by the appellate courts indicates the following degrees of inducement: In *Goree*, an officer on an undercover assignment played a game of pool with the defendant whom he apparently did not suspect of any criminal activity. When the officer asked the defendant to play another game, the defendant declined because he said he only had 50 cents and needed it for a "thing" (a marijuana cigarette). The officer then asked the defendant if he could get him "one of those things." The defendant asked: "You're not police are you?" The officer answered: "No, man you know better than that. I am not the man." The defendant then took \$3 from the officer, left for 15 minutes and returned with six marijuana cigarettes. He once again expressed the hope that the officer was not a policeman, after which he gave the cigarette to the officer. *Id.* at 306-07, 49 Cal. Rptr. at 393-94.

In *Ollado*, an officer and an informer whom the defendant had known for seven years and knew to be a narcotic addict went to the defendant's home. The informer told the defendant that he and the officer were "sick," meaning that they were suffering withdrawal symptoms and were greatly in need of heroin to relieve their distress, and asked the defendant to sell them some heroin. The officer then conversed with the defendant about the price, which was set at \$75. The defendant took the money and left for about 30 minutes, returning with the heroin in a green balloon inside his mouth. He handed the balloon to the officer, and before they left he informed them not to return unless they wanted to buy at least a quarter-ounce of heroin. *People v. Ollado*, 246 Cal. App. 2d 608, 609-10, 55 Cal. Rptr. 122, 122-23 (1966).



suggested by the officer.<sup>61</sup> If this conclusion were reached, then the defendant, although certainly guilty of the crime of possession of marijuana,<sup>62</sup> would not be blameworthy enough to be punished for the more serious offense of selling or furnishing marijuana.<sup>63</sup> Hence, the appellate court held that an instruction on entrapment should have been given.<sup>64</sup> On the other hand, the evidence in *Ollado* indicated that the defendant was already deeply involved in the illicit heroin traffic, and therefore he could not reasonably be deemed to be less culpable because he had been tricked by the police on a particular occasion. In this case the appellate court held that the defendant had received a fair trial although he was not allowed to develop his case on entrapment.<sup>65</sup> The *Goree* and *Ollado* courts appear to be making entrapment available to persons who lack sufficient culpability to merit punishment, and denying the defense to persons who are sufficiently blameworthy despite the methods used to apprehend them.

As noted earlier, under the "police conduct" theory the entrapped defendant is guilty of the crime charged, but is acquitted in order to establish proper standards for enforcement of the criminal law. This method of setting proper police standards through acquittal is an additional weakness of the "police conduct" theory. Courts in various jurisdictions have carried out the duty of setting standards for law enforcement by establishing rules on matters such as illegal search and seizure<sup>66</sup> and confessions obtained during an illegal detention,<sup>67</sup> but these rules have been based on the traditional power of the courts over the admission and exclusion of evidence,<sup>68</sup> and

<sup>61</sup> *People v. Goree*, 240 Cal. App. 2d 304, 310, 49 Cal. Rptr. 392, 395 (1966).

<sup>62</sup> The defendant intended to buy a "thing" for himself anyway, so it cannot be said that the officer entrapped him into possessing marijuana. See note 60 *supra*.

<sup>63</sup> Compare CAL. HEALTH & SAFETY CODE § 11530, where possession of marijuana is made punishable by imprisonment "for not less than one year nor more than 10 years," with CAL. HEALTH & SAFETY CODE § 11531, where selling or furnishing marijuana is made punishable by imprisonment "from five years to life." There is a possibility of parole in the former after 1 year, while in the latter parole is not possible until after 3 years.

<sup>64</sup> *People v. Goree*, 240 Cal. App. 2d 304, 312, 49 Cal. Rptr. 392, 396 (1966).

<sup>65</sup> *People v. Ollado*, 246 Cal. App. 2d 608, 615, 55 Cal. Rptr. 122, 126 (1966).

<sup>66</sup> See, e.g., *Weeks v. United States*, 232 U.S. 383 (1914). Illegal search and seizure is prohibited by the fourth amendment to the United States Constitution. There is nothing in the Constitution, however, which expressly prohibits the admission of evidence obtained by an unlawful search and seizure. Hence, the courts which voluntarily adopted an exclusionary rule as to evidence obtained in violation of the fourth amendment, prior to the imposition of the exclusionary rule by the United States Supreme Court in *Mapp v. Ohio*, 367 U.S. 643 (1961), were setting standards for proper law enforcement; that is, standards which would avoid violations of constitutional guarantees. E.g., *id.*; *People v. Cahan*, 44 Cal. 2d 434, 445, 282 P.2d 905, 911 (1955). These courts were not simply enforcing rules imposed upon them by the Constitution.

<sup>67</sup> See, e.g., *McNabb v. United States*, 318 U.S. 332 (1943).

<sup>68</sup> E.g., *id.* at 341; *Weeks v. United States*, 232 U.S. 383, 398 (1914). See generally *McNabb v. United States*, 318 U.S. 332, 341 (1943).

not on a power to free guilty defendants. The power to exclude evidence has nothing to do with the ultimate question of the innocence or guilt of the particular defendant. The courts which use the "police conduct" theory are claiming a power to acquit defendants who are guilty of the crime charged. But the majority opinion in *Sorrells* points out that this amounts to judicial clemency,<sup>69</sup> and the United States Supreme Court has recognized clemency as an executive function.<sup>70</sup> Likewise in California the power of clemency is vested only in the governor.<sup>71</sup>

The theory that the defense of entrapment rests upon diminished culpability is not totally immune from logical criticism. A strong argument against it is that a person who has been induced to commit a crime cannot be any less culpable because it was a police officer or informer who made the inducement rather than an ordinary citizen.<sup>72</sup> Nevertheless, it appears that in the final analysis the defense of entrapment should be based on a social judgment that an otherwise innocent person who has fallen prey to traps set by society through its law enforcement officers, for the purpose of instigating violations of its own rules, does not deserve to be punished.<sup>73</sup> Hence, it is proposed that it would be better for California courts to abandon the reasoning of the "police conduct" theory, and hold that the legal justification for the doctrine of entrapment is that the entrapped person is not sufficiently culpable to be found "guilty" of the crime charged.

### Operation of the Doctrine in California

Since the appearance of the defense of entrapment in California in the early 20th century, the courts have established a number of rules to govern its operation. The most important of these rules govern: (a) whether or not the defendant may assert the defense while denying the crime; (b) the burden of proof required for the defense; (c) the duties of the court and jury in determining questions of law and fact; (d) the point at which entrapment is an appealable issue; and, (e) the test used to determine whether the defendant was in fact entrapped. These rules and some problems in their application are considered in the following discussion.

### Entrapment as an Admission of Guilt

For many years California courts took the position that denial of the criminal act was inconsistent with the defense of entrapment,<sup>74</sup> because "the defense necessarily assumes that the act charged as a public offense was committed."<sup>75</sup> In practice this rule meant that

<sup>69</sup> *Sorrells v. United States*, 287 U.S. 435, 449 (1932).

<sup>70</sup> *Id.*, citing *Ex parte United States*, 242 U.S. 27, 42 (1916).

<sup>71</sup> CAL. CONST. art. VII, § 1; CAL. PEN. CODE § 4800.

<sup>72</sup> See *Sherman v. United States*, 356 U.S. 369, 380 (1958) (concurring opinion, Frankfurter, J.).

<sup>73</sup> See Note, *Entrapment*, 73 HARV. L. REV. 1333, 1335 (1960).

<sup>74</sup> *E.g.*, *People v. Wallace*, 199 Cal. App. 2d 678, 681-82, 18 Cal. Rptr. 917, 918-19 (1962).

<sup>75</sup> *People v. Lee*, 9 Cal. App. 2d 99, 109, 48 P.2d 1003, 1007 (1935).

the defense was conditioned upon an admission by the defendant that the criminal act was committed. Despite criticism of the rule in various legal writings,<sup>76</sup> it persisted until the 1965 California Supreme Court case of *People v. Perez*.<sup>77</sup> In this case the court concluded, "[a] rule [of entrapment] designed to deter such unlawful [police] conduct cannot properly be restricted by compelling a defendant to incriminate himself as a condition to invoking the rule."<sup>78</sup> As a result of this decision, California courts now allow the defendant to deny commission of the criminal act and still assert the defense of entrapment.<sup>79</sup>

## Burden of Proof

As an affirmative defense, entrapment imposes on the defendant the "burden of proving that he was induced to commit the crime of which he is charged"<sup>80</sup> before it becomes an issue for the trier of fact. The trial court has the duty to determine whether the defendant has introduced enough evidence to meet this burden of proof; in other words, the trial court determines whether entrapment is an issue in the case to be considered by the trier of fact.<sup>81</sup> Mere suspicion and conjecture as to the defendant's entrapment on the part of his counsel is insufficient to make it an issue.<sup>82</sup> Until recently California law was vague as to the precise quantum of evidence required of a defendant in order to raise the issue of entrapment.<sup>83</sup> Was he required to introduce enough evidence, if believed, to prove by a preponderance that he was entrapped, or was it sufficient that he introduced enough evidence, if believed, to raise a reasonable doubt as to the existence of entrapment? This question constitutes an important problem facing the defendant during the presentation of his case at the trial, and a direct answer was not given by a California court until the 1966 case of *People v. Valverde*.<sup>84</sup> Since

<sup>76</sup> Note, *Entrapment*, 73 HARV. L. REV. 1333, 1343 (1960); 30 S. CAL. L. REV. 542, 544-45 (1957); Note, 70 HARV. L. REV. 1302, 1303 (1957).

<sup>77</sup> 62 Cal. 2d 769, 401 P.2d 938, 44 Cal. Rptr. 326 (1965). See also *People v. West*, 139 Cal. App. 2d 923, 293 P.2d 166 (Super. Ct. 1956).

<sup>78</sup> *People v. Perez*, 62 Cal. 2d 769, 775, 401 P.2d 934, 938, 44 Cal. Rptr. 326, 330 (1965).

<sup>79</sup> E.g., *People v. Monteverde*, 236 Cal. App. 2d 630, 640, 46 Cal. Rptr. 206, 214 (1965).

<sup>80</sup> *People v. Gutierrez*, 128 Cal. App. 2d 387, 390, 275 P.2d 65, 66 (1954).

<sup>81</sup> See, e.g., *People v. Evans*, 134 Cal. App. 2d 733, 736, 286 P.2d 368, 369-70 (1955).

<sup>82</sup> *People v. Outcault*, 90 Cal. App. 2d 25, 32, 202 P.2d 602, 606 (1949).

<sup>83</sup> Some courts have said that the defendant was entitled to an instruction on the theory of his defense so long as there was "substantial" evidence supporting it. E.g., *People v. Bernal*, 174 Cal. App. 2d 777, 783, 345 P.2d 140, 144 (1959) (not substantial); *People v. Gallagher*, 107 Cal. App. 425, 428, 290 P. 504, 505 (1930) (substantial). Other courts have used the term "sufficient" evidence. *People v. Marsden*, 234 Cal. App. 2d 796, 799, 44 Cal. Rptr. 728, 730 (1965). A third approach of the courts would allow the instruction if there was evidence "deserving of any consideration whatever." *People v. Alamillo*, 113 Cal. App. 2d 617, 620, 248 P.2d 421, 422 (1952). Clearly, the terms used by the courts do not precisely define the quantum of evidence required to satisfy the burden of showing entrapment.

<sup>84</sup> 246 Cal. App. 2d 318, 54 Cal. Rptr. 528 (1966).

this recent case has a new and significant effect on the defense of entrapment, a detailed analysis of its holding is appropriate.

In *Valverde*, the court of appeals affirmed the ruling of the trial court that the "defendant did not carry the burden of persuasion by a preponderance of the evidence as to the existence of entrapment . . ."<sup>85</sup> In so holding, the appellate court attempted to establish that proof by a preponderance of the evidence had always been the prevailing California rule for the defense of entrapment. The court did this by citing prior cases which held that the defendant had the burden of showing entrapment<sup>86</sup> and that entrapment is an affirmative defense.<sup>87</sup> The court also drew support from certain legal writers.<sup>88</sup> Yet the court concluded its discussion by stating that the quantum of evidence needed for entrapment had never been previ-

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<sup>85</sup> *Id.* at 321, 54 Cal. Rptr. at 530.

<sup>86</sup> *Id.* at 324-25, 54 Cal. Rptr. 532-33. The court begins with the language "burden of showing," concludes that this is "burden of persuasion or the burden of proof by a preponderance of the evidence," then indicates that this language is found in many cases. *Id.* at 325, 54 Cal. Rptr. 533. The cases the court cites, however, do not refer to entrapment in terms of the required quantum of evidence. They are: *People v. Terry*, 44 Cal. 2d 371, 372, 282 P.2d 19, 20 (1955); *People v. Braddock*, 41 Cal. 2d 794, 803, 264 P.2d 521, 526 (1953); *People v. Chavez*, 184 Cal. App. 2d 741, 743, 7 Cal. Rptr. 729, 731 (1960); *People v. Schwartz*, 109 Cal. App. 2d 450, 455, 240 P.2d 1024, 1027 (1952); *People v. Grijalva*, 48 Cal. App. 2d 690, 694, 121 P.2d 32, 34 (1941); *People v. Lee*, 9 Cal. App. 2d 99, 109, 48 P.2d 1003, 1007 (1935). The term "burden of showing" is used in these cases in the sense of "burden of proving." The California courts seem to use the phrases "burden of proving" and "burden of showing" interchangeably in entrapment cases. Compare *People v. Gutierrez*, 128 Cal. App. 2d 387, 390, 275 P.2d 65, 66 (1954), citing *People v. Braddock*, *supra*, with *People v. Ray*, 185 Cal. App. 2d 250, 254, 8 Cal. Rptr. 211, 213 (1960). It should be noted that this language, "burden of showing" or "burden of proving," is not used only to describe a required quantum of proof by a preponderance of the evidence. For example a defendant asserting self-defense, that is, circumstances of justification, excuse, or mitigation, must only raise a reasonable doubt, yet according to section 1105 of the Penal Code he has the "burden of proving" self-defense. See note 100 and accompanying text *infra*. Consequently, the reliance of the court on this type of language to show a required quantum of proof by a preponderance is open to question.

<sup>87</sup> *People v. Valverde*, 246 Cal. App. 2d 318, 325-26, 54 Cal. Rptr. 528, 533 (1966). The court cited the following cases indicating entrapment is an affirmative defense: *People v. Harris*, 213 Cal. App. 2d 365, 368, 28 Cal. Rptr. 766, 768 (1963); *People v. Hawkins*, 210 Cal. App. 2d 669, 671, 27 Cal. Rptr. 144, 146 (1963); *People v. Head*, 208 Cal. App. 2d 360, 365, 25 Cal. Rptr. 124, 128 (1962); *People v. Castro*, 167 Cal. App. 2d 332, 337, 334 P.2d 602, 605 (1959); *People v. Gutierrez*, 128 Cal. App. 2d 387, 390, 275 P.2d 65, 66 (1954). The word "affirmative" is not considered to have a specific meaning, so the court's reliance on this word to infer preponderance would not seem to be well-founded. See discussion of the use of the word "affirmative" at note 90 *infra* and accompanying text.

<sup>88</sup> *People v. Valverde*, 246 Cal. App. 2d 318, 324, 54 Cal. Rptr. 528, 532 (1966). The court referred to 1 B. WITKIN, CALIFORNIA CRIMES § 178 (1963) and Note, *Entrapment*, 73 HARV. L. REV. 1333, 1344-45 (1960), for support from legal writers who maintain that entrapment requires proof by a preponderance of the evidence. But see the writers listed in note 107 *infra* who feel the defendant's burden of proving entrapment requires that he only raise a reasonable doubt as to the defense.

ously decided:

We find no case that expressly states the defendant has the burden of proof by a preponderance of the evidence, but the repeated statements referring to an affirmative defense indicate that this is the fair inference to be drawn from the language in many cases.<sup>89</sup>

It is difficult to understand how the court could find that the repetition of the phrase "affirmative defense" in the cited cases created the inference of a requirement of a preponderance of evidence in entrapment cases since "the 'affirmative of the issue' lacks any substantial objective meaning . . ."<sup>90</sup> In attempting to find a prevailing rule in the case law for the quantum of evidence required for entrapment, the court failed to recognize that, in fact, the preceding California cases were inconclusive on the issue of quantum of evidence.<sup>91</sup> Regardless of the effort of the court to show a prevailing rule, the real basis of the decision is the doctrine of *Benford* that entrapment does not go to the question of guilt.<sup>92</sup>

The defendant in *Valverde* admitted making two sales of heroin to a police informer, but he felt that he had been entrapped by abnormal persuasion and inducement.<sup>93</sup> He maintained that his burden "to prove entrapment was only to introduce sufficient evidence to raise a reasonable doubt"<sup>94</sup> as to the existence of entrapment.<sup>95</sup> The defendant felt that when the evidence of entrapment raised a reasonable doubt, there was a reasonable doubt as to the question of guilt, and therefore the prosecution would fail to meet the quantum of proof imposed on it by section 1096 of the Penal Code. Section

<sup>89</sup> *People v. Valverde*, 246 Cal. App. 2d 318, 325, 54 Cal. Rptr. 528, 533 (1966).

<sup>90</sup> CAL. EVIDENCE CODE § 500, Law Revision Comm'n Comment. Section 500 says "a party has the burden of proof as to each fact the existence or non-existence of which is essential to the claim for relief or defense that he is asserting." This section supersedes former Cal. Code Civ. Proc. §§ 1869 and 1881. These sections referred to the allocation of the burden of proof in terms of issues which were "affirmative." The word "affirmative" was criticized as meaningless and a play on words. CAL. EVIDENCE CODE § 500, Law Revision Comm'n Comment. It was deleted in section 500. The comment points out that a criminal defense which comes under this section (and would have come under the earlier sections as an "affirmative" defense) may only require that it be proved by a reasonable doubt. *Id.* Thus the word "affirmative" gives no authority or indication that the quantum of evidence required to be raised by a defendant for entrapment is a preponderance. The quantum of evidence depends on whether the defense goes to the question of guilt. See *People v. McGill*, 10 Cal. App. 2d 155, 160, 51 P.2d 433, 435 (1935).

<sup>91</sup> See note 83, *supra*.

<sup>92</sup> *People v. Valverde*, 246 Cal. App. 2d 318, 322-24, 54 Cal. Rptr. 528, 531-32 (1966).

<sup>93</sup> "[The defendant] said Munoz [the informer] pleaded with him, saying he was sick. Being an ex-addict, [the defendant] knew what withdrawal symptoms were like and was sympathetic to Munoz." *Id.* at 320, 54 Cal. Rptr. 529-30.

<sup>94</sup> *Id.* at 321, 54 Cal. Rptr. at 530.

<sup>95</sup> The defendant claimed he had the "burden of producing evidence" rather than the "burden of persuasion." *Id.* The "burden of producing evidence" argued by the defendant is "the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue." CAL. EVIDENCE CODE § 110. See generally C. McCORMICK, EVIDENCE § 306 (1954).

1096 requires the state to prove the defendant guilty beyond a reasonable doubt.<sup>96</sup>

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal, but the effect of this presumption is only to place upon the state the burden of proving him guilty beyond a reasonable doubt.

If entrapment goes to the guilt or innocence of the accused, section 501 of the Evidence Code seems to give validity to the defendant's position that he need only raise a reasonable doubt as to the existence of entrapment. This section states that "[i]nsofar as any statute . . . assigns the burden of proof in a criminal action, such statute is subject to Penal Code Section 1096." It applies to statutory defenses which relate to the defendant's guilt<sup>97</sup> as opposed to statutory defenses which do not relate to guilt.<sup>98</sup>

Entrapment is not a statutory defense. However, self-defense, a statutory defense,<sup>99</sup> seems sufficiently analogous to entrapment to make section 501 persuasive in support of the defendant's position. Section 1105 of the Penal Code allocates to the defendant the "burden of proving" self-defense.<sup>100</sup> "Burden of proving" is the same phrase that is used in many of the entrapment cases to indicate the burden which the defendant must meet to show that he was induced to commit the crime with which he is charged.<sup>101</sup> If self-defense is established, no crime has been committed;<sup>102</sup> if the defense fails, the defendant is found guilty.<sup>103</sup> Entrapment follows a similar procedure; the decision on the issue leads to an acquittal or conviction.<sup>104</sup> Thus, self-defense and entrapment are both defenses which the defendant has the "burden of proving," and each leads either to an

<sup>96</sup> *People v. Valverde*, 246 Cal. App. 2d 318, 322, 54 Cal. Rptr. 528, 530 (1966).

<sup>97</sup> The comment to section 501 of the Evidence Code explains that "where a statute allocates the burden of proof to the defendant on any other issue [than insanity] relating to the defendant's guilt, the defendant's burden, as under existing law, is merely to raise a reasonable doubt as to his guilt."

<sup>98</sup> See CAL. PEN. CODE §§ 1016, 1020 for defenses which are not raised by a plea of not guilty.

<sup>99</sup> Certain statutes refer to what is commonly called self-defense. *E.g.*, CAL. PEN. CODE §§ 197, 198 (justifiable homicide), §§ 692, 693 (right to make lawful resistance).

<sup>100</sup> "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it [that is, self-defense], devolves upon him . . . ." CAL. PEN. CODE § 1105.

<sup>101</sup> *E.g.*, *People v. Barone*, 250 A.C.A. 883, 889, 58 Cal. Rptr. 783, 787 (1967); *People v. Adams*, 213 Cal. App. 2d 536, 540, 29 Cal. Rptr. 57, 59 (1963).

<sup>102</sup> See, *e.g.*, *People v. Toledo*, 85 Cal. App. 2d 577, 193 P.2d 953 (1948); *People v. Anderson*, 57 Cal. App. 721, 208 P. 204 (1922). See generally *R. PERKINS, CRIMINAL LAW* 883-909 (1957).

<sup>103</sup> See *People v. Furber*, 233 Cal. App. 2d 678, 43 Cal. Rptr. 771 (1965).

<sup>104</sup> See *Sherman v. United States*, 356 U.S. 369, 373 (1958), where the Court reversed the conviction as a result of finding entrapment as a matter of law. Cf. *People v. Sweeney*, 55 Cal. 2d 27, 357 P.2d 1049, 9 Cal. Rptr. 793 (1960), where the majority of the court held that there was no entrapment as a matter of law and sustained the conviction, while the dissent maintained that the conviction should be reversed because the defendant had been entrapped. *Id.* at 51, 53, 357 P.2d at 1063, 1064, 9 Cal. Rptr. at 807, 808.

acquittal or a conviction. In cases where self-defense is asserted the courts hold that the defendant has fulfilled the "burden of proving" when he raises a reasonable doubt as to the existence of the defense.<sup>105</sup> The defendant's contention in *Valverde* that he only had to raise the issue of entrapment by a reasonable doubt, though never previously considered, would seem tenable under this analysis. The position is not without support. A federal case<sup>106</sup> and several writers<sup>107</sup> have agreed with it.

The court in *Valverde* rejected the premise upon which the defendant's position depended—that is, that entrapment went to the question of guilt.<sup>108</sup> The court was following the theory of *Benford*.<sup>109</sup> Since under the theory of that case entrapment does not go to the question of guilt, the court reasoned, and was justified in concluding, that the defendant's burden was to prove the existence of entrapment by a preponderance of the evidence.<sup>110</sup> In criminal cases issues which do not go to the defendant's guilt are traditionally proved by a preponderance of the evidence.<sup>111</sup> For example, territorial jurisdiction,<sup>112</sup> venue,<sup>113</sup> and the defendant's absence from the

<sup>105</sup> See, e.g., *People v. Mohammed*, 189 Cal. 429, 208 P. 963 (1922); *People v. Ranson*, 119 Cal. App. 2d 380, 259 P.2d 910 (1953).

<sup>106</sup> See *United States v. Silva*, 180 F. Supp. 557 (S.D.N.Y. 1959), where the court said the defendant only had the burden of producing evidence as to entrapment and the prosecution had to prove the defendant's guilt beyond a reasonable doubt. *Id.* at 559.

<sup>107</sup> Note, *Entrapment: An Analysis of Disagreement*, 45 B.U.L. Rev. 542, 559-60 (1965) (prosecution must show beyond a reasonable doubt that inducement was not entrapment); Note, *The Law of Entrapment in Narcotics Arrests*, 38 NOTRE DAME LAW. 741, 745 (1963) (prosecution must show beyond a reasonable doubt that government activities are not entrapment); 45 TEX. L. REV. 578, 581 (1967), where the writer says "the trend is to require the prosecution to meet the traditional criminal standard of 'beyond a reasonable doubt.'" See Orfield, *Burden of Proof and Presumptions in Federal Criminal Cases*, 31 U. KAN. CITY L. REV. 30, 48-49 (1963); B. WITKIN, CALIFORNIA EVIDENCE §§ 205, 212 (2d ed. 1966). Section 205 states that the defendant has the burden of proof for entrapment, while from section 212 arises the inference that the burden set out in section 205 is to raise a reasonable doubt as to guilt. *But see* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE § 343 (1963); Note, *Entrapment*, 73 HARV. L. REV. 1333, 1344 (1960). See also MODEL PENAL CODE § 2.13 (Proposed Official Draft, 1962).

<sup>108</sup> *People v. Valverde*, 246 Cal. App. 2d 318, 322, 54 Cal. Rptr. 528, 530-31 (1966).

<sup>109</sup> *Id.* at 322-24, 54 Cal. Rptr. at 531-32.

<sup>110</sup> *Id.* at 322, 54 Cal. Rptr. at 530-31.

<sup>111</sup> *People v. McGill*, 10 Cal. App. 2d 155, 159-60, 51 P.2d 433, 435 (1935). In *Valverde* the court said the defendant had the "burden of persuasion" on the issue of entrapment, that is, "the burden of making the trier of the fact believe the facts asserted by a party." 246 Cal. App. 2d at 321, 54 Cal. Rptr. at 530. The burden of proving the fact is the burden referred to in section 115 of the Evidence Code. In terms of the quantum of evidence required by section 115, the "burden of proof" refers to the burden of proving the fact in question by a preponderance of the evidence . . . CAL. EVIDENCE CODE § 115, Law Revision Comm'n Comment. See generally C. McCORMICK, EVIDENCE § 307 (1954).

<sup>112</sup> E.g., *People v. Cavanaugh*, 44 Cal. 2d 252, 262, 282 P.2d 53, 59 (1955).

<sup>113</sup> E.g., *People v. Megladdery*, 40 Cal. App. 2d 748, 766, 106 P.2d 84, 94 (1940).

state to toll the statute of limitations<sup>114</sup> need only be shown by a preponderance. The defendant must prove insanity by a preponderance in order to overcome the presumption of sanity.<sup>115</sup> Also, when the defendant contends that some of the prosecution's evidence was obtained by illegal search and seizure, he must overcome the presumption of legality<sup>116</sup> by a preponderance.<sup>117</sup> The difference between the two quanta, reasonable doubt and preponderance, and the issues to which they apply is clearly stated in *People v. McGill*:<sup>118</sup>

[I]n a criminal action the burden is placed upon the people to establish beyond a reasonable doubt the "guilt" only of the defendant therein; which leaves issues which do not particularly relate to his guilt "to be made according to the preponderance of the evidence."<sup>119</sup>

The holding in *Valverde* that entrapment requires a preponderance of the evidence is a logical extension of the "police conduct" theory developed in *Benford*, since under that theory entrapment does not go to the guilt or innocence of the defendant. Thus, *Valverde* is only as sound as the theoretical justification of *Benford*. If entrapment is recognized as diminishing the defendant's culpability, as this comment has suggested, it would follow that the quantum of proof necessary to sustain the burden is controlled by section 1096 of the Penal Code. The defendant then would only have to introduce evidence sufficient to raise a reasonable doubt of entrapment, because this would raise a reasonable doubt of his guilt.

### Entrapment as a Question of Fact

Once the trial court determines that the defendant has successfully carried out his burden of introducing evidence, the existence or nonexistence of entrapment becomes a question of fact for the trier of fact<sup>120</sup>—that is, the jury, or the court if a jury trial has been waived. The trier of fact is the sole judge of the weight and worth of the evidence,<sup>121</sup> and makes the final determination of the issue of entrapment.<sup>122</sup>

<sup>114</sup> *E.g.*, *People v. McGill*, 10 Cal. App. 2d 155, 159-60, 51 P.2d 433, 435 (1935).

<sup>115</sup> *People v. Daugherty*, 40 Cal. 2d 876, 898, 256 P.2d 911, 925 (1953); *People v. Hickman*, 204 Cal. 470, 477, 268 P. 909, 912 (1928).

<sup>116</sup> *See Badillo v. Superior Court*, 46 Cal. 2d 269, 272, 294 P.2d 23, 25 (1956); *People v. Carswell*, 149 Cal. App. 2d 395, 399-400, 308 P.2d 852, 854-55 (1957).

<sup>117</sup> The defendant must overcome the presumption of legality by presenting a prima facie case of illegality. *Badillo v. Superior Court*, 46 Cal. 2d 269, 272, 294 P.2d 23, 25 (1956); *People v. Wozniak*, 235 Cal. App. 2d 243, 250, 45 Cal. Rptr. 222, 227 (1965); *People v. Johnson*, 195 Cal. App. 2d 573, 574-75, 16 Cal. Rptr. 1, 2-3 (1961).

<sup>118</sup> 10 Cal. App. 2d 155, 51 P.2d 433 (1935).

<sup>119</sup> *Id.* at 160, 51 P.2d at 435.

<sup>120</sup> *E.g.*, *People v. Austin*, 198 Cal. App. 2d 186, 189, 17 Cal. Rptr. 782, 784 (1961).

<sup>121</sup> *E.g.*, *People v. Gutierrez*, 128 Cal. App. 2d 387, 390, 275 P.2d 65, 66 (1954).

<sup>122</sup> *See, e.g.*, *People v. Hawkins*, 210 Cal. App. 2d 669, 672, 27 Cal. Rptr. 144, 146 (1962).



This California rule allowing the jury to make the final determination on the issue of entrapment does not seem consistent with the theory of *Benford*. Under *Benford* the legal justification for the defense is that it is a necessary means for the court to carry out its duty of setting proper standards for law enforcement. If it is the duty of the court to set proper law enforcement standards, and if the only purpose of the defense of entrapment is to establish such standards, then the court and not the jury should make the final determination of the existence or nonexistence of entrapment. When courts establish proper standards governing matters such as evidence obtained by illegal search and seizure and confessions obtained during illegal confinement, the courts and not the jury determine the fact of an illegal search and seizure or an unlawful confinement.<sup>123</sup> Indeed, allowing the jury to determine the issue in this situation makes the jury, and not the court, the arbiter of proper standards of law enforcement. The federal justices in both *Sorrells* and *Sherman* who supported the "police conduct" theory recognized the problem of submitting the issue on entrapment to the jury, and stressed that the issue should be determined by the court.<sup>124</sup>

It is not the position of this comment that the issue of entrapment should not be submitted to the jury. Rather, the point is raised to show that the procedure is inconsistent with the "police conduct" theory adopted by the California Supreme Court in *Benford*.

### Entrapment as a Question of Law

There are two situations in which the issue of entrapment is a matter to be determined by the court and not the jury. The first, which has already been discussed, is where the defendant fails to introduce sufficient evidence to meet his burden of proof. The second is where the evidence establishes entrapment as a matter of law. In this second situation the judge would apparently have a duty to direct a verdict of acquittal. California courts have recognized that entrapment may be established as a matter of law,<sup>125</sup> and have made it clear that the defense is not established as a matter of law where there is any substantial evidence from which the jury could reasonably infer that no entrapment had taken place.<sup>126</sup> When the issue on appeal involves this question the appellate court's inquiry is whether the prosecution's evidence, as a matter of law, shows entrap-

<sup>123</sup> See, e.g., *Steele v. United States* No. 2, 267 U.S. 505, 511 (1925); *People v. Gorg*, 45 Cal. 2d 776, 780, 291 P.2d 469, 471 (1955). See also UNIFORM RULE OF EVIDENCE 8.

<sup>124</sup> "Equally important is the consideration that a jury verdict, although it may settle the issue of entrapment in the particular case, cannot give significant guidance for official conduct for the future. Only the court, through the gradual evolution of explicit standards in accumulated precedents, can do this with the degree of certainty that the wise administration of justice demands." *Sherman v. United States*, 356 U.S. 369, 385 (1958) (concurring opinion, Frankfurter, J.); *Sorrells v. United States*, 287 U.S. 435, 458 (1932) (concurring opinion).

<sup>125</sup> See, e.g., *People v. Sweeney*, 55 Cal. 2d 27, 49, 357 P.2d 1049, 1062, 9 Cal. Rptr. 793, 806 (1960).

<sup>126</sup> E.g., *People v. John*, 191 Cal. App. 2d 313, 316, 12 Cal. Rptr. 696, 697 (1961).

ment.<sup>127</sup> These requirements make it very unlikely that entrapment will ever be found as a matter of law unless the trial court does so, and indeed no appellate cases appear where the court has ruled that the evidence showed entrapment as a matter of law.<sup>128</sup>

### When is Entrapment an Appealable Issue?

One question which appears to be in a somewhat confused state in California involves the point at which the defendant makes entrapment an issue which must be submitted to and decided by the jury to avoid reversal on appeal. Does the defendant make entrapment an appealable issue as soon as he introduces sufficient evidence to meet his burden of proof, or must he also request an instruction on the defense?

Normally the defendant requests an instruction on entrapment following the presentation of the evidence. The judge then determines whether the defendant has brought forth sufficient evidence, and instructs or refuses to instruct accordingly.<sup>129</sup> The refusal to instruct is a basis for appeal.<sup>130</sup> A problem arises, however, when the defendant introduces sufficient evidence yet fails to request an instruction on entrapment.<sup>131</sup>

A California appellate court in a 1962 case indicated that entrapment only becomes an issue after an offer of instruction is made, and failure to make such a request means that there is no basis for appeal.<sup>132</sup> Yet the California Supreme Court in 1954 stated that when sufficient evidence has been introduced the trial court may instruct on entrapment although neither party so requests;<sup>133</sup> and in 1965 the supreme court indicated that the trial judge has a duty to instruct even if it is on his own motion.<sup>134</sup> Although this statement was not a holding of the case,<sup>135</sup> it was clear that entrapment would be an issue on retrial and the supreme court was advising the trial court on how to handle the question.<sup>136</sup> Hence, it appears that in California the defendant makes entrapment an issue as soon as he introduces sufficient evidence to meet his burden of proof, and a basis for appeal will lie from the court's failure to instruct whether or not the defendant has made a request for an instruction. In

<sup>127</sup> *E.g.*, *People v. Benford*, 53 Cal. 2d 1, 12, 345 P.2d 928, 936 (1959); *People v. Estrada*, 211 Cal. App. 2d 722, 727-28, 27 Cal. Rptr. 605, 608 (1963).

<sup>128</sup> *But see* *People v. Sweeney*, 55 Cal. 2d 27, 53, 357 P.2d 1049, 1064, 9 Cal. Rptr. 793, 808 (1960) (dissenting opinion); *People v. Braddock*, 41 Cal. 2d 794, 813, 264 P.2d 521, 532 (1953) (dissenting opinion).

<sup>129</sup> *See, e.g.*, *People v. Evans*, 134 Cal. App. 2d 733, 736-37, 286 P.2d 368, 369 (1955). *See also* *People v. Chenault*, 74 Cal. App. 2d 487, 498, 169 P.2d 29, 36 (1946).

<sup>130</sup> *See, e.g.*, *People v. Goree*, 240 Cal. App. 2d 304, 305, 49 Cal. Rptr. 392 (1966).

<sup>131</sup> *See, e.g.*, *People v. Hawkins*, 210 Cal. App. 2d 669, 671-72, 27 Cal. Rptr. 144, 146 (1962).

<sup>132</sup> *Id.*

<sup>133</sup> *People v. Jackson*, 42 Cal. 2d 540, 547, 268 P.2d 6, 10-11 (1954).

<sup>134</sup> *People v. Perez*, 62 Cal. 2d 769, 775, 401 P.2d 934, 937, 44 Cal. Rptr. 326, 329 (1965).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

any event, it is settled that the defense of entrapment is to be presented in the trial court,<sup>137</sup> and it cannot be raised for the first time on appeal<sup>138</sup> or on a motion for a new trial.<sup>139</sup> If the defendant succeeds in having his case reversed and remanded for retrial on other grounds, however, he may raise the defense of entrapment for the first time at the new trial.<sup>140</sup>

### Origin of Intent Test

Once the accused has raised the issue of entrapment by the introduction of sufficient evidence, the trier of fact makes a determination of the existence or nonexistence of entrapment by using an "origin of intent" test<sup>141</sup> similar to the test employed in the federal courts.<sup>142</sup> Under this test the jury must determine whether the intent to commit the crime originated in the mind of the officer or informer, or in the mind of the defendant.<sup>143</sup> If the evidence shows that the criminal intent originated in the mind of the police officer or informer, and that he lured a person into committing a criminal act not otherwise contemplated by that person, then entrapment is a successful defense.<sup>144</sup> On the other hand, if the evidence shows that the defendant already had the intent to commit the crime at the time he was induced by the police, then it is said that the police merely afforded him the opportunity to commit the offense<sup>145</sup> and no amount of trickery or fraud on the part of the police will constitute entrapment.<sup>146</sup>

Under the origin of intent test, the evidence must first show that the police conduct itself fell below certain standards before entrapment can be found. The fact that the defendant committed a crime after being solicited to do so by a police officer or informer raises no inference of unlawful entrapment.<sup>147</sup> There must be evidence of persuasion, deceitful representation, inducement or allurement on the part of the officer or informer, or the defense fails.<sup>148</sup>

<sup>137</sup> *E.g.*, *People v. Hawkins*, 210 Cal. App. 2d 669, 671-72, 27 Cal. Rptr. 144, 146 (1962); *People v. Ryan*, 103 Cal. App. 2d 904, 909, 230 P.2d 359, 362 (1951).

<sup>138</sup> *People v. Tostado*, 217 Cal. App. 2d 713, 719, 32 Cal. Rptr. 178, 182 (1963); *People v. Griffin*, 209 Cal. App. 2d 557, 563, 26 Cal. Rptr. 311, 314 (1962).

<sup>139</sup> *People v. Polsalski*, 181 Cal. App. 2d 795, 800, 5 Cal. Rptr. 762, 765-66 (1960).

<sup>140</sup> *People v. Perez*, 62 Cal. 2d 769, 775, 401 P.2d 934, 937, 44 Cal. Rptr. 326, 329 (1965).

<sup>141</sup> *See People v. Jackson*, 42 Cal. 2d 540, 547, 268 P.2d 6, 11 (1954); *People v. Cordero*, 240 Cal. App. 2d 826, 829, 49 Cal. Rptr. 924, 926 (1966).

<sup>142</sup> *See United States v. Head*, 353 F.2d 566, 568 (6th Cir. 1965).

<sup>143</sup> *See, e.g.*, *People v. Benford*, 53 Cal. 2d 1, 10, 345 P.2d 928, 934 (1959).

<sup>144</sup> *See, e.g.*, *People v. Grososky*, 73 Cal. App. 2d 15, 18, 165 P.2d 757, 759 (1946) (dictum).

<sup>145</sup> *See, e.g.*, *People v. Moraga*, 244 Cal. App. 2d 565, 568, 53 Cal. Rptr. 563, 565 (1966).

<sup>146</sup> *See, e.g.*, *People v. Ollado*, 246 Cal. App. 2d 608, 615, 55 Cal. Rptr. 122, 126 (1966).

<sup>147</sup> *E.g.*, *People v. Jalifi*, 139 Cal. App. 2d 368, 371, 293 P.2d 878, 880 (1956).

<sup>148</sup> *See, e.g.*, *People v. Marsden*, 234 Cal. App. 2d 796, 798, 44 Cal. Rptr. 728, 729-30 (1965); *People v. Price*, 172 Cal. App. 2d 776, 779, 342 P.2d 437, 439 (1959); *People v. Evans*, 134 Cal. App. 2d 733, 736, 286 P.2d 368, 369 (1955).

In prosecutions for the sale of narcotics<sup>149</sup> the courts have held that where the evidence shows no more persuasion on the part of the officer or informer than is necessary for an ordinary sale, there can be no entrapment.<sup>150</sup>

If sufficient police persuasion is shown, the trier of fact still must find that the defendant did not have a preexisting criminal intent prior to his contact with the alleged entrapper.<sup>151</sup> Unlike the federal courts,<sup>152</sup> the California courts do not allow the prosecution to introduce evidence of prior criminal convictions, commission of prior crimes, or general criminal reputation in order to prove that the defendant had a preexisting criminal intent.<sup>153</sup> Instead, the issue of origin of intent must be determined from other relevant, but less prejudicial, evidence.

The California appellate courts apparently have found that a reasonable determination of the issue can be made from evidence of the details of the transaction itself. Any time the evidence shows that the defendant first suggested the crime, the defense of entrapment will not be available.<sup>154</sup> Evidence of the readiness with which the defendant committed the criminal act is said to be indicative of the origin of intent.<sup>155</sup> If the accused readily responded to a solicitation of the crime, the probabilities of a preexisting criminal intent on his part are increased. A recent California case<sup>156</sup> has made it clear, however, that readiness, or "hair-trigger susceptibility,"<sup>157</sup> to suggestion of crime will not negate the defense of entrapment as a matter of law.<sup>158</sup> Other evidence may indicate that the act was still an isolated incident not intended or designed by the defendant until induced by the police.<sup>159</sup>

Some California courts have indicated that the jury will be especially warranted in finding that the defendant had a preexisting

<sup>149</sup> See generally CAL. HEALTH & SAFETY CODE § 11501 (narcotics other than marijuana), § 11531 (sale of marijuana), § 11532 (sale of marijuana to minors).

<sup>150</sup> E.g., *People v. Moraga*, 244 Cal. App. 2d 565, 568, 53 Cal. Rptr. 563, 565 (1966); *People v. Richardson*, 152 Cal. App. 2d 310, 318, 313 P.2d 651, 656 (1957).

<sup>151</sup> See, e.g., *People v. Estrada*, 211 Cal. App. 2d 722, 726, 27 Cal. Rptr. 605, 607 (1963).

<sup>152</sup> See, e.g., *Sherman v. United States*, 356 U.S. 369, 375 (1958).

<sup>153</sup> *People v. Benford*, 53 Cal. 2d 1, 11, 345 P.2d 928, 935 (1959). But cf. *People v. Marshall*, 226 Cal. App. 2d 243, 245, 37 Cal. Rptr. 887, 888 (1964), where the court held that the rule barring inquiry into prior convictions, criminal activities, and criminal reputation will not prevent introduction of evidence on those matters if admissible upon grounds unrelated to entrapment. See also *People v. Estrada*, 211 Cal. App. 2d 722, 727, 27 Cal. Rptr. 605, 608 (1963) where the court held that the rule barring inquiry into prior convictions, prior criminal activities, and criminal reputation is advantageous to the defendant, and does not deny him due process of the law.

<sup>154</sup> See, e.g., *People v. Sweeney*, 55 Cal. 2d 27, 50, 357 P.2d 1049, 1062-63, 9 Cal. Rptr. 793, 806-07 (1960).

<sup>155</sup> See, e.g., *People v. Harris*, 210 Cal. App. 2d 613, 616, 26 Cal. Rptr. 850, 852 (1962).

<sup>156</sup> *People v. Goree*, 240 Cal. App. 2d 304, 49 Cal. Rptr. 392 (1966).

<sup>157</sup> *Id.* at 310, 49 Cal. Rptr. at 395.

<sup>158</sup> *Id.* at 310-11, 49 Cal. Rptr. at 395.

<sup>159</sup> See *id.* at 310, 49 Cal. Rptr. at 395-96.

criminal intent where the offense charged is of the type to be habitually committed.<sup>160</sup> No court has exactly defined a habitually committed crime, but it is evident that the courts feel that the offense of selling or furnishing narcotics falls within the category.<sup>161</sup> One court has explained that this offense is a habitually committed crime because it "is often conducted as a trade and persons engage in it on a more or less regular basis."<sup>162</sup> If the offense charged is of the type to be habitually committed, the probabilities are increased over the average crime that the defendant was already engaged in the criminal activity and had a preexisting intent to commit the crime if afforded the opportunity.<sup>163</sup>

Other evidence which the appellate courts have deemed relevant to the issue of origin of intent includes familiarity with the particular criminal activity,<sup>164</sup> possession of a large supply of the illegal contraband prior to any police inducement,<sup>165</sup> ready access to the contraband,<sup>166</sup> and the ability to produce a large amount of the illegal material in a short time.<sup>167</sup> Furthermore, the defendant's own testimony and extrajudicial admissions which shed light on any matter relevant to the origin of intent may be used in determining the issue,<sup>168</sup> whether similar evidence obtained from other sources would be admissible or not.<sup>169</sup> Finally, any evidence relevant to the issue of origin of intent but inadmissible by some rule of evidence, may be used in making a determination of the issue if the party to which the evidence is harmful fails to make timely objection to its admission.<sup>170</sup>

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<sup>160</sup> Compare *People v. Benford*, 53 Cal. 2d 1, 11, 345 P.2d 928, 935 (1959), with *People v. Neal*, 120 Cal. App. 2d 329, 332, 261 P.2d 13, 15 (1953).

<sup>161</sup> See, e.g., *People v. Goree*, 240 Cal. App. 2d 304, 305, 308, 49 Cal. Rptr. 392, 394 (1966); *People v. Neal*, 120 Cal. App. 2d 329, 330, 332, 261 P.2d 13, 15 (1953).

<sup>162</sup> *People v. Goree*, 240 Cal. App. 2d 304, 308, 49 Cal. Rptr. 392, 394 (1966).

<sup>163</sup> *Id.*

<sup>164</sup> E.g., *People v. Neal*, 120 Cal. App. 2d 329, 333, 261 P.2d 13, 15 (1953). Familiarity with the criminal activity has been inferred from the following evidence: knowledge of the going prices of a narcotic, *People v. Estrada*, 211 Cal. App. 2d 722, 726-27, 27 Cal. Rptr. 605, 607 (1963); a concept of methods of delivery that would protect the seller, *id.* at 726, 27 Cal. Rptr. at 607; knowledge of sources of supply, *People v. Moreno*, 237 Cal. App. 2d 602, 606, 47 Cal. Rptr. 287, 289 (1965); intricate methods of delivery, *id.*; needle marks on the inner elbows, *People v. Haggard*, 181 Cal. App. 2d 38, 45, 4 Cal. Rptr. 898, 902 (1960).

<sup>165</sup> See *People v. Diaz*, 206 Cal. App. 2d 651, 671, 24 Cal. Rptr. 367, 378 (1962).

<sup>166</sup> See *People v. Burnett*, 204 Cal. App. 2d 453, 456, 22 Cal. Rptr. 320, 322-23 (1962).

<sup>167</sup> See *People v. Neal*, 120 Cal. App. 2d 329, 333, 261 P.2d 13, 15 (1953).

<sup>168</sup> See, e.g., *People v. Evans*, 134 Cal. App. 2d 733, 737, 286 P.2d 368, 370 (1955).

<sup>169</sup> E.g., *People v. Chavez*, 184 Cal. App. 2d 741, 744, 7 Cal. Rptr. 729, 731 (1960). The appellate court held that the trial court's failure to instruct the jury not to consider on the issue of entrapment the defendant's testimony as to his prior convictions was not error where this evidence of prior convictions would have been inadmissible if the prosecution had attempted to introduce it. *Id.*

<sup>170</sup> *People v. Monteverde*, 236 Cal. App. 2d 630, 642, 46 Cal. Rptr. 206,

The operation of the California origin of intent test to determine entrapment seems to be a relatively fair and reasonable procedure, especially when compared to the tests advocated by the United States Supreme Court in *Sorrells* and *Sherman*. The federal "majority" test is similar to the California test, except that the prosecution in a federal case is allowed to rebut a claim of entrapment by introducing evidence of prior convictions, suspicious activities, and general criminal reputation to show that the defendant was "pre-disposed" to commit the crime<sup>171</sup> or that the police had "reasonable cause" to believe he was engaged in crime.<sup>172</sup> The prejudicial effect of such evidence upon a defendant with a criminal record can hardly be denied; and the practice of allowing the evidence to be used has received severe criticism from numerous legal writers.<sup>173</sup> When the probative value of this sort of evidence is measured against the resulting danger of prejudice, it is difficult to justify its use.

Also, under the federal "minority" test entrapment would be determined solely by examination of the police conduct, without any subjective consideration of the preexisting intent of the particular defendant.<sup>174</sup> It is hard to avoid the conclusion that the limitation upon evidence of intent could lead to undesirable situations. A defendant might be regularly engaged in criminal activity, have a preexisting intent to commit the crime, and yet he could be acquitted merely because he was suspicious during the transaction and had to be coaxed by a high degree of police persuasion. Likewise, the federal "minority" test could lead to the conviction of a person who actually had no preexisting intent to commit the crime, but was peculiarly susceptible to criminal suggestion and complied with the

215 (1965). The appellate court pointed out that the jury could consider evidence of defendant's good reputation for truth and veracity even though the prosecution had not attacked his reputation, because the prosecution had failed to object to the admission of the evidence. *Id.*

<sup>171</sup> See *Sorrells v. United States*, 287 U.S. 435, 451 (1932).

<sup>172</sup> See *Trice v. United States*, 211 F.2d 513, 516 (9th Cir. 1954).

<sup>173</sup> *E.g.*, *Sorrells v. United States*, 287 U.S. 435, 458-59 (1932) (concurring opinion, Roberts, J.); Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1108 (1951). "Appeals to sympathy, friendship, the possibility of exorbitant gain [by the police] . . . can no more be tolerated when directed against a past offender than against an ordinary law-abiding citizen. A contrary view runs afoul of fundamental principles of equality under law, and would espouse the notion that when dealing with the criminal classes anything goes. The possibility that no matter what his past crimes and general disposition the defendant might not have committed the particular crime unless confronted with inordinate inducements, must not be ignored. Past crimes do not forever outlaw the criminal and open him to police practices, aimed at securing his repeated conviction, from which the ordinary citizen is protected. The whole ameliorative hopes of modern penology and prison administration strongly counsel against such a view." *Sherman v. United States*, 356 U.S. 369, 383 (1958) (concurring opinion, Frankfurter, J.).

<sup>174</sup> According to this test, the defendant would be acquitted unless "in holding out inducements they [the police] should act in such a manner as is likely to induce to the commission of crime only [those persons already engaged in criminal conduct and willing to commit further crimes] . . . and not others who would normally avoid crime and through self-struggle resist ordinary temptations." 356 U.S. at 384.

solicitation after a relatively small amount of inducement.

The California origin of intent test avoids both of these major drawbacks. It does not unnecessarily prejudice the defendant or unduly burden the prosecution, while it furnishes the jury with a means of making a relatively accurate determination on the issue of entrapment.

### Conclusion

The "police conduct" theory of entrapment adopted by California in *People v. Benford* is not as sound as the opposing theory that an entrapped defendant is not culpable enough to be subject to criminal punishment.<sup>175</sup> First, the "police conduct" theory is weak because its reasoning is circular, and ultimately must be reduced to a conclusion that the defendant is not sufficiently blameworthy to merit punishment. If he is sufficiently blameworthy, there is nothing impermissible about the police conduct, and the defendant should be punished for his crime. Second, the "police conduct" theory is untenable because it does not appear to be within the judicial power to set proper standards for law enforcement by means of acquitting guilty defendants. Also, even though the California courts since *Benford* verbally follow the view that entrapment does not relieve the defendant's guilt, they nevertheless appear to make the defense available to those persons who are not sufficiently blameworthy to be punished and deny it to those who are.

Although the differing theories on the legal justification for entrapment have been developed largely through case dicta and would seem to have little practical effect upon the operation of the defense so far as the defendant is concerned, this in fact is not so. In California the "police conduct" theory has led to the establishment of the defendant's burden of proof at a preponderance of the evidence.<sup>176</sup> If entrapment were recognized as going to the question of guilt or innocence, then the issue would fall within the purview of section 1096 of the California Penal Code and the defendant's burden of proof would only be to raise a reasonable doubt.<sup>177</sup> Hence, the defendant has to make out a much stronger case of entrapment under the one theory than under the other.

Aside from being unsound, the "police conduct" theory is inconsistent with an older California rule governing the operation of the defense which has not been changed; that is, the rule which makes entrapment an issue to be determined by the jury.<sup>178</sup> If the only rationale for the defense is that it is a means of setting proper standards for law enforcement and the duty to set such standards belongs exclusively to the court, then the court and not the jury should determine the issue. The fact that the court would be determining questions of fact would not be unusual or unprecedented, since courts determine questions of fact in issues such as illegal search and seizure and confessions obtained during unlawful con-

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<sup>175</sup> See text accompanying notes 48-73 *supra*.

<sup>176</sup> See text accompanying note 85 *supra*.

<sup>177</sup> See text following note 119 *supra*.

<sup>178</sup> See text accompanying notes 120-22 *supra*.

finement.<sup>179</sup> On the other hand, there is little or no precedent for allowing juries to set proper standards for law enforcement. Only if entrapment is seen as going to the question of the defendant's guilt or innocence, should the issue be determined by the jury.

The California "origin of intent" test appears to be a relatively fair and reasonable way of determining the issue of entrapment, especially when compared to the federal "majority" and "minority" tests.<sup>180</sup> The test prevents the defendant with a criminal record from being unduly prejudiced, while it furnishes the trier of fact with a reasonably accurate means of distinguishing between the otherwise innocent person and the professional criminal. In this way it allows the defense of entrapment to be used to strike a fair balance between individual rights and the interests of society.

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<sup>179</sup> See cases cited at note 123 *supra*.

<sup>180</sup> See text following note 170 *supra*.

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